

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,
Plaintiff,

v.

JOSE GOMEZ-HERNANDEZ,
Defendant.

No. CR-08-6005-FVS

ORDER DISMISSING INDICTMENT

THIS MATTER came before the Court for oral argument on the Defendant's Motion to Dismiss the Indictment, Ct. Rec. 33. Assistant United States Attorney James P. Hagarty appeared on behalf of the United States. The Defendant was present and represented by Kelly A. Canary.

The Defendant, Jose Gomez-Hernandez, is charged with being found in the United States after four prior deportations. The Defendant moves to dismiss the indictment on the grounds that the four prior deportation orders were unconstitutionally invalid. The Court finds that the entry of the deportation order of May 11, 2006 was fundamentally unfair. The subsequent orders reinstating the May 11, 2006 deportation order were likewise fundamentally unfair. The Defendant's motion will accordingly be granted and the indictment dismissed.

BACKGROUND

On April 19, 2006, the U.S. Citizenship and Immigration Services
ORDER DISMISSING INDICTMENT- 1

1 ("USCIS") issued a Notice to Appear to the Defendant. Def.'s Ex. A.
2 The Notice alleged that the Defendant was a native of Mexico present
3 in the United States without permission. The Notice further alleged
4 that the Defendant had been convicted of the crime of Second Degree
5 Robbery in the Superior Court of Washington in 2004. *Id.* at 2.

6 The Defendant executed a Notice to Respondent requesting an
7 immediate hearing and waiving his right to a 10-day waiting period.
8 Def.'s Ex. B. The Defendant was given notice that he would be held in
9 custody until his case had been resolved. Def.'s Ex. C.

10 On May 9, 2006 the Defendant and the Bureau of Immigration and
11 Customs Enforcement ("ICE") entered into a Stipulated Request For
12 Order and Waiver of Hearing. Def.'s Ex. D. Through this document,
13 the Defendant represented that he was aware of his legal rights,
14 admitted to the factual allegations in the Notice, and waived his
15 right to a hearing before an immigration judge. *Id.* at ¶¶ 2-4. He
16 also agreed to accept a written order of removal and waived his right
17 to appeal the written order. *Id.* ¶¶ 10-11.

18 On May 11, 2006 Immigration Judge Kenneth Josephs issued an order
19 providing for the Defendant's removal from the United States on the
20 basis of the Stipulated Request for Order described above. Def.'s Ex.
21 E. A warrant of Removal or Deportation was issued the next day,
22 Def.'s Ex. F, and the Defendant was deported.

23 The Defendant reentered the United States on three subsequent
24 occasions: July 3, 2006, July 13, 2006, and July 18, 2006. Def.'s Ex.
25 G; Def.'s Ex. I; Def.'s Ex. K. On each occasion, a USCIS official
26 reinstated the deportation order of May 11, 2006 and the Defendant was

1 deported.

2 On January 15, 2008, a grand jury indicted the Defendant on one
3 count of being an Alien in the United States After Deportation.
4 Indictment, Ct. Rec. 13. The Indictment alleges that the Defendant
5 has been previously deported on four prior occasions, all "subsequent
6 to a conviction on March 4, 2005, of Robbery in the Second Degree."

7 DISCUSSION

8 I. STATUTORY AND REGULATORY FRAMEWORK

9 A. Stipulated Removal

10 Under the Immigration and Nationality Act ("INA"), an immigration
11 judge must determine whether or not an alien is deportable. 8 U.S.C.
12 § 1229a(a)(1). An immigration judge may enter an order of deportation
13 on the basis of a stipulation between the alien and the USCIS. 8
14 U.S.C. § 1229a(d). By regulation, the immigration judge may do so
15 without a hearing on the basis of the charging documents and, in
16 relevant cases, the stipulation. 8 C.F.R. § 1003.25(b). However, "If
17 the alien is unrepresented, the Immigration Judge must determine that
18 the alien's waiver [of a hearing] is voluntary, knowing, and
19 intelligent." *Id.*

20 B. Voluntary Departure

21 Prior to the completion of deportation proceedings, the Attorney
22 General may grant an alien permission to depart voluntarily. 8 U.S.C.
23 § 1229c(a)(1). Such "fast-track voluntary removal" is unavailable if
24 the alien has previously committed an aggravated felony. *Id.*; 8
25 U.S.C. § 1227(a)(1)(A)(iii). The term "aggravated felony" includes
26 crimes of violence for which the term of imprisonment is at least one

1 year. 8 U.S.C. § 1101(a)(43)(J). Fast-track voluntary removal is
2 also unavailable if the alien has engaged or is currently engaging in
3 terrorist activity. 8 U.S.C. § 1227(a)(4)(B); 8 U.S.C. § 1182(a)(3).
4 The failure of an immigration judge to inform an alien of his or her
5 eligibility for fast-track voluntary removal constitutes a denial of
6 due process. *United States v. Ortiz-Lopez*, 385 F.3d 1202, 1204 (9th
7 Cir. 2004).

8 The Attorney General may also permit an alien to depart
9 voluntarily at the conclusion of deportation proceedings. 8 U.S.C. §
10 1229c(b)(1). However, an alien is only eligible for voluntary
11 departure at this time if he or she "has been a person of good moral
12 character for at least 5 years immediately preceding the alien's
13 application for voluntary departure." 8 U.S.C. § 1229c(b)(1)(b).

14 **C. Reinstatement**

15 When an alien illegally reenters the United States following
16 removal, USCIS may reinstate the prior removal order without reopening
17 or reexamining it. 8 U.S.C. § 1231(a)(5). An immigration officer
18 determines whether reinstatement is appropriate in any particular
19 case. *Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 495 (9th Cir.
20 2007). "The alien has no right to a hearing before an immigration
21 judge in such circumstances." 8 C.F.R. § 241.8. Nor may the alien
22 collaterally attack the underlying removal order. *Morales-Izquierdo*,
23 486 F.3d at 496 (citing 8 U.S.C. § 1231(a)(5)).

24 **I. LEGAL STANDARD**

25 A defendant facing charges under Section 1326 has a Fifth
26 Amendment right to meaningful review of the underlying deportation.

1 *United States v. Ubaldo-Figueroa*, 364 F.3d 1042, 1047-48 (9th Cir.
2 2003) (citing *United States v. Mendoza-Lopez*, 481 U.S. 828, 839, 107 S.
3 Ct. 2148, 95 L. Ed. 2d 772). By statute, a defendant facing charges
4 under Section 1326 may collaterally attack the underlying removal
5 when,

6 1) the alien exhausted any administrative remedies that may
7 have been available to seek relief against the order;

8 (2) the deportation proceedings at which the order was
9 issued improperly deprived the alien of the opportunity for
10 judicial review; and

(3) the entry of the order was fundamentally unfair.

11 8 U.S.C. § 1326(d). A removal order is fundamentally unfair when,

12 1) Defects in the underlying deportation proceeding
13 infringed upon the defendant's due process rights AND

14 2) The defendant suffered prejudice as a result of the
15 defects.

Ubaldo-Figueroa, 364 F.3d at 1048.

16 The Defendant argues that the indictment in this case should be
17 dismissed because the four prior deportation orders upon which it is
18 based are invalid. It does not appear that there are any
19 administrative remedies available to the Defendant. Nor does it
20 appear that the Defendant has previously had an opportunity for
21 judicial review of the prior deportation orders. Pursuant to the
22 stipulation of May 9, 2006, the Defendant waived his right to appeal
23 the May 11 deportation. The reinstatement process does not permit
24 reexamination of the deportation order being reinstated. The only
25 disputed issue before the Court is whether the prior deportations were
26 fundamentally unfair.

1 **II. WAS THE MAY 11, 2006 DEPORTATION VALID?**

2 **A. Did the May 11, 2006 Deportation Proceeding Deprive the**
3 **Defendant of Due Process?**

4 **1. Burden of proving waiver**

5 The Defendant argues that the Government bears the burden of
6 proving that the Defendant's waiver of his rights was voluntary,
7 knowing, and intelligent. The Government responds that the Defendant
8 bears the burden of establishing that his due process rights were
9 violated. Neither party has cited any authority that bears directly
10 on the issue of which party bears the burden.

11 The Court concludes that the Government bears the burden of
12 establishing waiver. In a related context, the Ninth Circuit has held
13 that the Government bears the burden of proving that an alleged alien
14 gave a voluntary, knowing, and intelligent waiver of his or her right
15 to appeal a deportation. *United States v. Lopez-Vasquez*, 1 F.3d 751,
16 754 (9th Cir. 1993). Moreover, the Government has ready access to,
17 and control of, the USCIS records that are probably the most
18 conclusive documentary evidence of waiver or lack thereof. The
19 interests of justice therefore suggest that the burden of establishing
20 waiver should fall on the Government.

21 Even if the burden of proof were to fall on the Defendant, it
22 appears that the Defendant has met this burden. The Defendant has
23 introduced the only evidence available to him, his own testimony, to
24 show that he never spoke with an immigration judge. The Government
25 has admitted that no contrary evidence exists. The evidence before
26 the Court thus establishes that the Defendant was never brought before
an immigration judge, either before the deportation of May 11, 2006,

1 nor in connection with any of the subsequent deportations.

2 **2. Waiver of Defendant's right to a hearing**

3 Although an immigration judge may find a waiver to be voluntary,
4 knowing, and intelligent on the basis of the documentary record, the
5 documentary record did not reflect such a waiver in this case.
6 Rather, the record reflected that the Defendant requested an expedited
7 hearing. Only after he had been held in custody for twenty days did
8 the Defendant enter into a stipulation. The Defendant indicates that
9 he was told that he "could be deported immediately if I signed the
10 stipulation." Declaration of Jose Gomez-Hernandez, March 25, 2008,
11 Ct. Rec. 34-3 ¶ 3. In these circumstances, the Defendant's decision
12 to forego a hearing was not voluntary. The deportation proceedings of
13 May 2006 thus deprived him of due process of law.

14 Citing the Ninth Circuit's decision in *United States v.*
15 *Calderon-Segura*, 512 F.3d 1104 (9th Cir. 2008), the Government argues
16 that the Defendant's Stipulated Request for Order establishes that the
17 Defendant's waiver of his rights was voluntary, knowing, and
18 intelligent. This argument is unpersuasive because *Calderon-Segura*
19 does not, as the Government has argued, hold that a stipulation
20 conclusively establishes that a defendant's waiver is voluntary,
21 knowing, and intelligent. Moreover, *Calderon-Segura* is
22 distinguishable from the present case in two respects. First,
23 *Calderon-Segura* concerned a challenge to the expedited removal process
24 based on the equal protection clause. The Defendant in the present
25 case is challenging four particular deportation proceedings based on
26 the due process clause. Second, the defendant in *Calderon-Segura* was

1 ineligible for voluntary departure and, as a result, could not
2 demonstrate that the challenged action resulted in prejudice. As
3 explained more fully below, the Defendant currently before the Court
4 has demonstrated prejudice. The immigration judge's failure to obtain
5 a voluntary, knowing, and intelligent waiver of the Defendant's right
6 to a hearing thereby infringed upon his right to due process of law.

7 **3. Waiver of Defendant's right to counsel**

8 An individual facing deportation proceedings has no Sixth
9 Amendment right to counsel. However, Congress has recognized the
10 right to counsel as "among the rights stemming from the Fifth
11 Amendment guarantee of due process that adhere to individuals that are
12 the subject of removal proceedings." *Tawadrus v. Ashcroft*, 364 F.3d
13 1099, 1103 (9th Cir. 2004) (citing 8 U.S.C. § 1362(d)). Any waiver of
14 the right to counsel must be voluntary, knowing, and intelligent.
15 *Mendoza-Mazariegos v. Mukasey*, 509 F.3d 1074, 1080 (9th Cir. 2007).
16 "Failure to obtain such a waiver is an effective denial of the right
17 to counsel" and amounts to a violation of due process if the resulting
18 prejudice "is so great as to potentially affect the outcome of the
19 proceedings." *Tawadrus*, 364 F.3d at 1103.

20 In order to obtain a knowing and voluntary waiver of the right to
21 counsel, an immigration judge must "(1) inquire specifically as to
22 whether petitioner wishes to continue without a lawyer; and (2)
23 receive a knowing and voluntary affirmative response." *Mendoza-*
24 *Mazariegos*, 509 F.3d at 1080. It follows that an alleged alien can
25 not make a knowing and voluntary waiver in the absence of an adequate
26 colloquy. See *Partible v. Immigration & Naturalization Serv.*, 600

1 F.2d 1094, 1096 (5th Cir. 1979) (holding waiver of right to counsel not
2 knowing and voluntary where Defendant waived her rights "without being
3 provided with any understanding by the immigration judge of the
4 complexity of her dilemma and without any awareness of the cogent
5 legal arguments which could have been made on her behalf").

6 Here, it is undisputed that the Defendant never went before an
7 immigration judge and never engaged in a colloquy. The immigration
8 judge could neither specifically inquire into the Defendant's wish to
9 continue without a lawyer, nor receive a knowing and voluntary
10 response. Under *Mendoza-Mazariegos*, the May 11, 2006 deportation thus
11 constituted a denial of the Defendant's right to counsel.

12 As discussed more fully below, this denial was sufficiently
13 prejudicial to potentially affect the outcome of the proceedings. The
14 immigration judge's failure to obtain a voluntary, knowing, and
15 intelligent waiver of the Defendant's right to counsel thereby
16 infringed upon his right to due process of law.

17 **B. Did the Defect in the May 2006 Deportation Proceeding**
18 **Prejudice the Defendant?**

19 In order to show that he or she suffered prejudice as a result of
20 a procedural defect in a deportation proceeding, a defendant must
21 "offer plausible grounds of relief which might have been available to
22 him but for the deprivation of rights." *United States v.*
23 *Zarate-Martinez*, 133 F.3d 1194, 1198 (9th Cir. 1998). A denial of the
24 right to counsel is prejudicial when the actions of a competent
25 attorney would have exposed pertinent information. See *Castro-O'Ryan*
26 *v. U.S. Dep't of Immigration and Naturalization*, 847 F.2d 1307, 1313
(9th Cir. 1987) (holding denial of right to counsel was sufficiently

1 prejudicial to remand a denial of an application for withholding
2 deportation to the Board of Immigration Appeals where the arguments of
3 competent defense counsel would have drawn correct standard to
4 immigration judge's attention).

5 Here, the Defendant was eligible for fast-track voluntary
6 departure under 8 U.S.C. § 1229c(a)(1). Although the Defendant had
7 previously been convicted of Second-Degree Robbery, he was sentenced
8 to a period of incarceration of less than one year. Under Ninth
9 Circuit law, a crime of violence is considered an aggravated felony
10 for immigration purposes only when the term of imprisonment actually
11 imposed exceeded one year. *United States v. Pimental-Flores*, 339 F.3d
12 959, 962 (9th Cir.2003) (citing *Alberto-Gonzalez v. INS*, 215 F.3d 906,
13 909-910 (9th Cir. 2000)). The Defendant's prior conviction for
14 second-degree robbery thus did not render him ineligible for fast-
15 track voluntary departure.

16 If the Defendant's request for an expedited hearing had been
17 honored, the immigration judge would have been obligated to inform him
18 of his eligibility for fast-track voluntary departure under *Ortiz-*
19 *Lopez*. The immigration judge's failure to obtain a knowing,
20 voluntary, and intelligent waiver of the Defendant's right to a
21 hearing was thus prejudicial. If the Defendant had been represented
22 by counsel, a competent attorney would have drawn the possibility of
23 fast-track voluntary departure to his attention. The denial of the
24 Defendant's right to counsel was therefore prejudicial under *Castro-*
25 *O'Ryan*.

26 The Government argues that the Defendant was not prejudiced by

1 the immigration judge's failure to obtain a valid waiver of his rights
2 because his prior conviction for second-degree robbery may qualify as
3 a "crime of moral turpitude," making him ineligible for voluntary
4 departure. However, good moral character is a requirement for
5 voluntary departure at the conclusion of deportation proceedings under
6 Section 1229c(b). It is not a requirement for fast-track voluntary
7 departure under Section 1229c(a). Whether the Defendant's prior
8 second-degree robbery conviction qualifies as a crime of moral
9 turpitude is therefore irrelevant.

10 **III. WERE THE SUBSEQUENT REINSTATEMENTS OF THE MAY 11, 2006**
11 **DEPORTATION ORDER VALID?**

12 The failure of the reinstatement process to provide for a hearing
13 does not render it facially unconstitutional. *Alvarenga-Villalobos v.*
14 *Ashcroft*, 271 F.3d 1169, 1173 (9th Cir. 2001). Nor is the
15 reinstatement process necessarily unconstitutional when the underlying
16 deportation proceeding violated due process. *Morales-Izquierdo*, 486
17 F.3d at 496. As the Ninth Circuit has explained,

18 Reinstatement of a prior removal order--regardless of the
19 process afforded in the underlying order--does not offend
20 due process because reinstatement of a prior order does not
21 change the alien's rights or remedies. The only effect of
the reinstatement order is to cause Morales' removal . . .
The reinstatement order imposes no civil or criminal
penalties, creates no new obstacles to attacking the
validity of the removal order.

22 *Id.* at 497-98 (emphasis added). However, neither *Alvarenga-Villalobos*
23 nor *Morales-Izquierdo* forecloses the possibility that reinstatement
24 could violate due process of law when used as a basis for a subsequent
25 criminal prosecution. Indeed, *Morales-Izquierdo* explicitly left "open
26 the possibility that individual petitioners may raise procedural

1 defects in their particular cases." *Id.* at 496.

2 The Court finds that the reinstatement process is
3 unconstitutional as applied to the present case. *Mendoza-Lopez*
4 established that a criminal defendant must be permitted to
5 collaterally attack a deportation order underlying the charges pending
6 against him or her if there was no opportunity for judicial review at
7 the time of the original removal. The reinstatement process does not
8 permit any review of the underlying deportation order. The Defendant
9 therefore did not have an opportunity for judicial review on the three
10 occasions that the May 11, 2006 deportation order was reinstated.
11 Given that the May 11, 2006 removal order deprived the Defendant of
12 due process of law, it would be a further deprivation of due process
13 to charge the Defendant with criminal conduct on the basis of the
14 subsequent reinstatements.

15 The Government argues that *Alvarenga-Villalobos* and
16 *Morales-Izquierdo* foreclose the argument that the reinstatement
17 process violates procedural due process. However, both
18 *Alvarenga-Villalobos* and *Morales-Izquierdo* are distinguishable from
19 the present case. *Mendoza-Lopez* established that collateral attack of
20 a prior removal order must be available when 1) the Government seeks
21 to use the prior removal as an element of a criminal offense and 2)
22 "the alien was deprived of the right to judicial review in the initial
23 proceeding." *Id.* Both of these conditions exist in the present case.
24 Neither was present in *Alvarenga-Villalobos*: it dealt with the
25 constitutionality of the reinstatement process in a civil context
26 where the plaintiff had received due process in connection with the

1 underlying removal order. Similarly, the plaintiff in
2 *Morales-Izquierdo* was unable to show that the defect in the underlying
3 deportations prejudiced him.

4 The Government further argues that the reinstatement process is
5 fully consistent with the INA because Congress has delegated the
6 authority to reinstate removal orders to the Attorney General. The
7 Attorney General is not required to delegate this authority to an
8 immigration judge. However, the nature and extent of the authority
9 delegated by Congress to the Department of Homeland Security and its
10 employees is irrelevant. It is a basic principle of administrative
11 law that Congress can not delegate authority that it does not have.
12 It is an even more basic principle of American law that Congress does
13 not have the authority to override the Constitution. The Court being
14 fully advised,

15 **IT IS HEREBY ORDERED:**

16 1. The Defendant's Motion to Dismiss the Indictment, **Ct. Rec. 33,**
17 is **GRANTED.**

18 2. The charge set forth in the Indictment, Ct. Rec. 1, is
19 **DISMISSED.**

20 **IT IS SO ORDERED.** The District Court Executive is hereby
21 directed to enter this order, furnish copies to counsel, and **CLOSE THE**
22 **FILE.**

23 **DATED** this 16th day of May, 2008.

24
25 s/ Fred Van Sickle
Fred Van Sickle
26 Senior United States District Judge